No. 84-6811

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

WARREN MCCLESKEY,
Petitioner,

v.

RALPH M. KEMP, Superintendent, Georgia Diagnostic & Classification Center,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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BRIEF AMICUS CURIAE OF THE WASHINGTON LEGAL FOUNDATION AND THE ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF RESPONDENT

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QUESTIONS PRESENTED

1. Whether a state's system for imposing capital punishment which has been otherwise upheld as constitutional in all respects may be held unconstitutional merely because the collective sentencing results it has produced during a given period of years do not conform to subjective notions of racial proportionality in sentencing.

2. Whether, in the absence of any evidence of intentional race discrimination causing the petitioner's individual death sentence, that sentence may be set aside as unconstitutional merely because the collective sentencing results of the past do not conform to subjective notions of racial proportionality in sentencing.

3. Whether a claim that the death penalty has been unconstitutionally imposed due to race discrimination can succeed without the necessity of proving purposeful or intentional discrimination by state actors merely by asserting the claim under the Eighth Amendment instead of under the equal protection clause of the Fourteenth Amendment.

4. Whether a claim that the death penalty has been unconstitutionally imposed due to race discrimination can be based upon evidence of disparities in sentencing associated solely with the race of the victim, as distinguished from the race of the defendant.

5. Whether the district court's factual finding that the studies relied upon by petitioner were too flawed and untrustworthy to constitute cognizable evidence of actionable sentencing discrimination was clearly erroneous.

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INTERESTS OF AMICI CURIAE

The Washington Legal Foundation ("WLF") is a non-profit public interest law and policy center based in Washington, D.C., with over 80,000 members nationwide. WLF engages in litigation, administrative proceedings, and policy advocacy in support of the legal and constitutional values and principles on which America was founded.

WLF devotes substantial effort to asserting the rights of victims of crime and supporting effective law enforcement measures. WLF has also been a leading voice in support of the legitimacy of the death penalty

from both a constitutional and policy standpoint. The Foundation's experience and expertise on this issue are reflected in the *amicus curiae* briefs it has filed in many of the leading Supreme Court decisions on capital punishment. *E.g., Zant v. Stephens*, 462 U.S. 862 (1983); *Strickland v. Washington*, 104 S. Ct. 2052 (1984); *Eddings v. Oklahoma*, 455 U.S. 104 (1982). WLF attorneys have also been repeatedly invited to testify before the U.S. Congress on capital punishment issues.

WLF believes the instant case is of critical importance for its potential impact on not only capital punishment law but on many broader areas where claims of racially disparate impact may be raised. If petitioner prevails here, the jurisprudence of racial and ethnic proportionality will be carried to unprecedented extremes in the governance of this nation. The notion that the duly convicted murderer of a policeman could escape an otherwise valid death sentence by invoking the race of his *victim* as a defense is repugnant to any decent sense of law and justice.

The Allied Education Foundational ("AEF"), established in 1964, is a non-profit charitable and educational foundation based in Englewood, New Jersey, and devoted to the pursuit of knowledge, education, and the broad public interest.

As part of its education and public interest efforts, AEF also supports the publication of books and studies on issues of law and law enforcement. Recently, for example, AEF joined with WLF in publishing a scholarly legal study on the death penalty, *Capital Punishment 1986: Last Lines of Defense*. A chapter of that study directly challenges the theory of discrimination in capital sentencing reflected in petitioner's argument in this case. Because AEF believes that petitioner's argument here is not only profoundly erroneous as a matter of law, but profoundly misleading in its portrayal of the American

criminal justice system, AEF's commitment to the spread of knowledge and to the rule of law have motivated it to join WLF in the following brief.

STATEMENT OF THE CASE

In the interests of judicial economy, amicus adopts and incorporates by reference the statement of the case set forth in the Brief of the Respondent.

SUMMARY OF ARGUMENT

1. Georgia's statutory scheme for imposing the death penalty has been repeatedly upheld as constitutional under the exacting standards imposed by this Court. That indisputably constitutional system was fairly applied in petitioner's case, and there was no evidence that intentional race discrimination caused or influenced his death sentence. The mere fact that petitioner submits a study purporting to show that the collective sentencing outcomes of other Georgia capital cases fail to conform to subjective notions of racial proportionality provides no valid basis for questioning petitioner's sentence under these circumstances. Allowing death sentences to be reversed solely on the basis of disparate impact data, and without proof of actual discriminatory motive, would be unjust, unworkable, and a source of disastrous upheaval for the entire criminal sentencing process.

2. Even if an authentic and substantial race-based disparity in sentencing could be viewed as a valid basis for invalidating a death sentence, petitioner could not prevail on the facts of this case. Official government statistics demonstrate that, if anything, the death sentence has been disproportionately imposed on white murder defendants. Petitioner's attempt to evade that fact by shifting his claim to *victim*-based racial disparities cannot salvage his case. This Court has not endorsed that oblique theory of discrimination, and there is no just

or principled basis for it to do so now. Finally, the District Court's findings that the sentencing studies relied on by petitioner were fatally flawed and invalid were not clearly erroneous. They should be affirmed by this Court.

ARGUMENT

Preliminary Statement

This case addresses the extraordinary argument that a state's otherwise valid system for imposing the death penalty should be declared unconstitutional solely because it fails to allocate death sentences in conformity with theoretical notions of racial proportionality. Neither the presence of meticulously fair sentencing standards nor the absence of any discriminatory intent is considered pertinent under this argument. All that counts is the racial breakdown of collective sentencing statistics.

Moreover, the petitioner rests his claim on the curious premise that juries would discriminate primarily on the basis of the slain *victim's* race, rather than that of the criminal defendant in the dock—despite the contradictory circumstance that the victim is perforce absent from the trial and the victim's race is rarely a matter of relevant concern at trial. Petitioner's reliance on this contrived theory of "victim-based" discrimination is at least understandable, however, in light of the fact that the more plausible theory of direct discrimination against black defendants does not stand up. Official studies comparing the sentencing of white and black perpetrators now establish that it is actually *white* murderers who disproportionately receive the death penalty. *See* Bureau of Justice Statistics Bulletin, *Capital Punishment 1984*, pp. 7, 9, Tables 11, A-1, A-2 (August 1985). This inescapable fact refutes petitioner's sweeping factual claim that the death penalty discriminates against minorities. His legal theory fares no better.

I. MERE FAILURE TO MAINTAIN AN "ACCEPTABLE" DEGREE OF RACIAL PROPORTIONALITY IN CAPITAL SENTENCING PROVIDES NO GROUNDS FOR STRIKING AN OTHERWISE VALID CAPITAL PUNISHMENT SYSTEM

A. A Death Sentence's Constitutionality Depends Upon Its Conformity With Governing Legal And Procedural Standards, Not Upon Its Conformity To Statistical Notions of Racial Proportionality

Petitioner, the duly-convicted murderer of a policeman in Fulton County, Georgia, was sentenced to death by a judge following the binding recommendation of a jury. He now claims that his death sentence should be set aside because he is black, the policeman he murdered was white, and a study he cites purports to show that death penalties are disproportionately imposed on killers of white people.

The dispositive flaw in petitioner's argument is that it utterly discounts the significance of the extensive legal safeguards incorporated in the Georgia death penalty scheme in conformity with post-*Furman* capital sentencing requirements. Georgia's current death penalty statute and practice have been reviewed, refined, and approved under this Court's exacting constitutional scrutiny. *Gregg v. Georgia*, 428 U. S. 153 (1976); *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Zant v. Stephens*, 462 U.S. 862 (1983). Those cases, together with numerous lower court decisions upholding Georgia death sentences against other forms of attack, *e.g.*, *Ross v. Kemp*, 756 F.2d 1483 (11th Cir. 1985), establish that the Georgia capital sentencing system has satisfactorily eliminated the kind of standardless, arbitrary sentencing discretion originally condemned in *Furman v. Georgia*, 408 U.S. 238 (1972). It does so by, *inter alia*, enumerating objective aggravating circumstances which genuinely narrow the class of persons eligible for the death penalty and by providing for "individualized determination and appellate review at the selection stage." *Zant* v. *Stephens*,

462 U.S. at 879-80. The Georgia system even *exceeds* constitutional requirements by providing for a form of 'proportionality review' by the Georgia Supreme Court in each case. *Id.* at 880 n. 19.

Georgia having satisfied this Court's exacting standards of fairness and procedure in capital sentencing, petitioner now urges the Court to superimpose a novel and fundamentally different requirement. *He contends that the state must insure some acceptable (but unspecified) degree of racial proportionality in the allocation of the death sentence.* Not only must the state ensure that minority murderers receive no more than their "proportional" share of death sentences, but it must also guarantee that those murderers who choose to kill white *victims* are not disproportionately sentenced to death. This approach would require generalized, class-based considerations to preempt the particulars of the individual crime in deciding whether the death penalty is justified. It is racial balancing run amuck.

How the state is expected to achieve and maintain this state of fine-tuned racial equilibrium in sentencing is not explained or addressed in petitioner's arguments—and for good reason. For to do so would only bring petitioner, full circle, to the very kind of standards which this Court has *already* established—*and which the State of Georgia has already satisfied*—as a remedy to the arbitrary and standardless sentencing practices struck down in the *Furman* case. Racial discrimination is merely one manifestation of the arbitrary and irrational sentencing inequities which the post-*Furman* capital sentencing statutes were designed to minimize and contain. A capital sentencing system which has been carefully reviewed and approved by this Court on those terms is no less constitutional merely because the collective sentencing results it produces do not conform to notions of demographic parity.

Thus, the sufficient answer to petitioner's contentions was stated by the Fifth Circuit in the leading case of

Spinkellink v. Wainwright, 578 F.2d 582, 613 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979):[1]

> The allegation that Florida's death penalty is being discriminatorily applied to defendants who murder whites is nothing more than an allegation that the death penalty is being imposed arbitrarily and capriciously, a contention we previously have considered and rejected.
>
> * * *
>
> As we previously noted, this Court reads *Furman*, *Gregg*, *Proffitt*, *Jurek*, *Woodson*, and *Roberts* as holding that if a state follows a properly drawn statute in imposing the death penalty, then the arbitrariness and capriciousness—and therefore the racial discrimination—condemned in *Furman* have been conclusively removed.

Petitioner's contrary approach subordinates the significance of the actual procedures and practices followed in *his* case to the cumulative sentencing results in hundreds of remote cases tried years before, involving different crimes, different victims, different judges, and different juries. Even if validated post-*Furman* procedures were scrupulously adhered to throughout *his* case, and even if a perfectly unbiased judge and/or jury decided *his* sentence, the constitutionality of that sentence would be dictated by the collective statistical profile of the unrelated cases of the past. This is not a rational basis for invalidating a given murderer's sentence. It is a statistical lottery.

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[1] This very same point has been echoed in the opinions of members of this Court. *E.g.*, *Stephens v. Kemp*, 104 S.Ct. 562, 564-65 (1983) (Powell, J., dissenting), where Justice Powell, joined by three other justices, flating asserted, "It should be apparent from the decisions of this Court since *Gregg* was decided that *claims based merely on general statistics are likely to have little or no merit under statutes such as that in Georgia.*" [emphasis added]. This statement squarely applies to the instant case.

Petitioner's arguments make a mockery of the very core of the post-*Furman* approach to capital punishment —*i.e.*, that the best means of achieving fairness and rationality in capital sentencing is by observing objective standards and procedures which limit and channel sentencing discretion without eliminating it altogether. In effect, petitioner contends that full and faithful compliance with such approved standards is futile if it does not produce (*and maintain*) results which conform to conclusory notions of racially "proportionate" sentencing. This "result-oriented" approach is alien to this Court's post-*Furman* jurisprudence on capital punishment, and should be firmly rejected.

The most significant shortcoming of the Baldus Study in this context is that it tells us *nothing* about the fairness and legal propriety of *petitioner's* trial and sentencing. There is no evidence here showing that *McCleskey's* conviction and sentencing were actually motivated by race discrimination— intentional or otherwise—or by any other impermissible considerations. The authors of the Baldus study themselves concede as much. 753 F.2d at 895. In fact, petitioner's entire case was conducted in faithful conformity to the rigorous procedures required for all capital proceedings under federal constitutional law and the law of Georgia.

To invalidate his sentence based upon flawed evidence of an unremarkable deviation from racial proportionality would be to subordinate settled standards of criminal procedure to the vagaries and manipulations of questionable social science theory. This Court should decline such a dubious invitation.

In rejecting the closely-related argument in *Pulley v. Harris* that "proportionality review" of all death sentences is constitutionally required, this Court stressed that in light of the many other safeguards incorporated in the approved post-*Furman* death penalty statutes "*pro-*

portionality review would have been constitutionally superfluous." 104 S.Ct. at 879 [emphasis added]. The race-based statistical analysis of past sentences in capital cases is but an improvised variant of proportionality review, and it is redundant and unnecessary for the same reasons stated in *Pulley v. Harris.*

B. The Statistical Disparities Alleged Cannot Prove Discriminatory Intent, Which Has Been Consistently Required By the Courts As A Necessary Element Of A Race-Based Attack On A Death Sentence

Petitioner's arguments notwithstanding, the federal courts have consistently and properly required proof of discriminatory intent as a mandatory element of claims that the death penalty violates the Eighth and/or Fourteenth Amendments by some form of race discrimination. The cases so holding are legion. *E.g., Spinkellink v. Wainwright, supra,* 578 F.2d. at 612-15; *Adams v. Wainwright,* 709 F.2d. 1443, 1449-50 (11th Cir. 1983); *Ross v. Kemp,* 756 F.2d 1483, 1491 (11th Cir. 1985); *Shaw v. Martin,* 733 F.2d. 304, 311-14 (4th Cir. 1984), *cert. denied,* 83 L.Ed. 2d. 159 (1984); *Brogdon v. Blackburn,* 790 F.2d. 1164, 1170 (5th Cir. 1986); *Prejean v. Maggio,* 765 F.2d. 482, 486 (5th Cir. 1985); *Andrews v. Shulsen,* 600 F.Supp. 408, 426 (D.Utah 1983), *appeal pending,* No. 84-2781 (10th Cir. 1986).

Petitioner now asks this Court to hold that this imposing array of federal precedents is wrong, and that discriminatory intent really need not be proven *at all.* (Pet.'s Br. pp. 98-104). Petitioner would effectively eliminate the intent requirement by the simple expedient of recasting his equal protection/discrimination claim in the guise of an Eighth Amendment claim, and contending that discriminatory intent is wholly irrelevant to a claim of cruel and unusual punishment. (Pet.'s Br. pp. 97-103).

There are numerous dispositive flaws in this argument.

Initially, as cogently expressed by the district court (*McCleskey v. Zant*, *supra*, 580 F.Supp. at 346-47), the Eighth Amendment does not even validly apply to death penalty appeals based upon "race of the victim" disparate impact theory. Relatedly, the Eighth Circuit has held that perpetrators lack standing to assert a claim based on disparate sentencing impact in relation to the *victim's* race. *Britton v. Rogers*, 631 F.2d 571, 577 n.3 (8th Cir. 1980), *cert. denied*, 451 U.S. 939 (1981). *See also Spinkellink*, *supra*, 578 F.2d at 614 n.39 ("the focus of any inquiry into the application of the death penalty must necessarily be limited to the persons who receive it rather than their victims"). This Court should now hold that constitutional attacks on the death penalty based on claims of victim-related racial disparities in collective sentencing data may be maintained (*if at all*, see Point II.B, *infra*) only under the equal protection clause of the Fourteenth Amendment. Compare *McCleskey v. Zant*, *supra*, 580 F.Supp. at 347. Such claims are not remotely within the scope of the cruel-and-unusual punishment clause as contemplated and recorded by the Framers of the Bill of Rights. *See* R. Berger, DEATH PENALTIES, pp. 44-58 (Harv.U.Press 1982). That amendment bans only cruel and barbarous *punishments*, and does not purport to establish a standard of proportionality or parity for the allocation of sentences among the various classes of criminals.

Further, acceptance of petitioner's argument would effectively nullify the discriminatory intent element which is indisputably required to sustain a death penalty challenge on equal protection grounds. *Washington v. Davis*, 426 U.S. 229 (1976). This requirement of purposeful discrimination normally requires *direct proof of actual discriminatory motive;* only in the very rare circumstances where the disparate impact is so monolithic as to defy explanation on any plausible non-racial

grounds can the intent requirement be satisfied by "impact" statistics alone. *Washington v. Davis*, *supra*, 426 U.S. at 242. Here, there are so many alternative plausible explanations for the claimed racial disparities in death-sentencing[2]—e.g., the demonstrated fact that white-victim murders are a consistent "proxy" for high-aggravation felony murders (see Point II. A., *infra*)—that a purely statistical mode of proof is plainly foreclosed.

Whatever the required mode of proof, the specific intent requirement for claims of racially discriminatory action by the state cannot be evaded by simply presenting the claim in alternative legal garb. A claim of unconstitutional race discrimination is still just that, whether asserted under the Eighth or Fourteenth Amendment. The mandatory element of purposeful discrimination is grounded on decades of mature and considered jurisprudence; it reflects the considered judgment of our law that seemingly "disproportionate" outcomes in terms of race or other characteristics are generally explainable by a host of legitimate factors other than actionable discrimination; and it is not to be dismissed by the kind of legal sleight-of-hand attempted by petitioner in this case.

Petitioner also errs in contending that the element of intent is simply irrelevant to Eighth Amendment claims. Any shortage of caselaw explicitly stating a discriminatory intent requirement results from the simple fact that discrimination claims like petitioner's are simply *inapposite* to Eighth Amendment jurisprudence, the precise and proper concern of which is barbarous forms of punishment rather than a guarantee of racial equilibrium in sentencing. To the extent that the Eighth Amendment

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[2] Among these plausible alternative explanations are the myriad non-racial variables which were *not* taken into account by the Baldus Study in trying to explain the sentencing "discrepancies" which the petitioner is pleased to ascribe to race. *See* Point II.D, *infra*.

might be held to encompass claims of racially discriminatory sentencing, it would be utterly anomalous to hold that such claims may be established on facts which would plainly fail to violate the *Fourteenth* Amendment. It is only by virtue of the Fourteenth Amendment, after all, that the Eighth Amendment has any application to the State of Georgia's sentencing practices at all.

Further, this Court only recently reiterated that the intent and culpability of state actors is indeed relevant to Eighth Amendment claims. In *Whitley v. Albers*, 106 S.Ct. 1078, 1084 (1986), Justice O'Connor's opinion for the Court stated as follows:

> It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishments Clause, ...

While there the Court was addressing the Eighth Amendment's application to conditions of confinement rather than methods of sentencing, the underlying principle still applies in both instances: The cruel and unusual punishment clause has no legitimate application to the merely "inadvertent" and unintentional imperfections and aberrations in our human system of criminal justice. *Accord*: *Pulley v. Harris*, 104 S.Ct. at 881.

Petitioner's contention that inadvertent statistical disparities in the distribution of death sentences violates the Eighth Amendment is a grotesque distortion of the Constitution. The Eighth Amendment has *nothing* to do with a requirement for precisely calibrated allocations of sentences among the various races and ethnic groups.

What the Eighth Amendment *has* been held to require in the allocation of the death sentence is that it not be dispensed in a wholly arbitrary and "freakish" manner, such that there is *no rational justification* for the decision that one man is sentenced to death while another

receives only a term of imprisonment. The death penalty procedures applied in this case by the State of Georgia have conclusively passed that test, *Zant v. Stephens*, 462 U.S. at 879-80, and nothing in the Baldus studies can undermine that controlling fact.

C. The Standard of Statistical Proportionality Advocated by Petitioner Is Unreasonable, Unworkable, And Unjust When Applied To The Outcome of the Criminal Sentencing Process

This Court has repeatedly stressed that in capital cases the jury is called upon to make a "highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves." *Caldwell v. Mississippi*, 105 S.Ct. 2633 n.7 (1985), (quoting *Zant v. Stephens*, 462 U.S. 862, 900 (1983). That sensitive judgment is simply not susceptible to the crude categorizations and generalizations on which all the conclusions and comparisons of the Baldus study must ultimately rest.

In *Pulley v. Harris, supra*, 104 S.Ct. at 881, this Court further acknowledged that

> Any capital sentencing scheme may occasionally produce abberational outcomes. Such inconsistencies are a far cry from the major systemic defects identified in *Furman*. As we have acknowledged in the past, "there can be no 'perfect procedures for deciding in which cases governmental authority should be used to impose death.'" [citations omitted]

Petitioner's arguments cannot be reconciled with the foregoing observations. Petitioner's theory holds that *any* deviation [3] from statistically-based norms of racially

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[3] Petitioner's brief asserts that "under the constitutional principles outlined earlier, racial discrimination of *any* magnitude is unconstitutional." (Pet.'s Br., p. 95; emphasis added).

proportional outcomes in a capital sentencing system would "require the invalidation of that system as a whole." Pet. Br. p. 107. The disastrous practical implications of this legal theory are perhaps the best proof of its invalidity.

Initially, the Court should carefully ponder *exactly* what a state would be required to do in order to "rehabilitate" a capital punishment system condemned under petitioner's theory of "statistical unconstitutionality." If the reason for the system's invalidation is its failure to conform capital sentencing outcomes to "acceptable" norms of racial balance, then the only fitting remedy would presumably be one that would eliminate or rectify such disparities to the fullest extent possible. *See, e.g., Swann v. Charlotte Mecklenberg*, 402 U.S. 1 (1971).

It would plainly not be enough for the state to enact and implement objective procedures and standards which prevent the arbitrary and unrestricted exercise of sentencing discretion. The State of Georgia has already done *precisely that*, to the full satisfaction of this Court. See *Gregg* and *Zant*, *supra*. The only evident alternative, then, would be for the state to take more direct and positive measures—known in other contexts as affirmative action—to *assure* the elimination of racially disproportionate sentencing outcomes.

This would presumably and logically entail a moratorium on the execution of all black murderers *and* of all murderers of white victims until the offensive statistical disparity was eliminated. Executions of white murderers of black victims could presumably go forward, since neither "defendant-based" nor "victim-based" racial bias could be credibly asserted in such cases. If this seems a bizarre and distorted remedy, it is because precisely such a remedy is required to fit the distorted and anomalous logic of petitioner's legal theory.

There is really *no* remedy which could satisfy the unreasonable and unrealistic standards of class-based jus-

tice advanced by petitioner in this case. Petitioner's purported concern that racial factors infect the sentencer's decisions in capital cases could only be resolved by the abolition of *all* jury discretion and the adoption of a mandatory death penalty approach (or, of course, complete abolition). But this Court has already rejected such an approach, *Woodson v. North Carolina*, 428 U.S. 280 (1976), in favor of a regime which consciously tolerates the occasional variances produced by the sentencer's discretion as long as they are rationally governed by objective limitations and standards. *Pulley v. Harris*, 104 S.Ct. at 881. Acceptance of petitioner's arguments in this case would require the abandonment of these fundamental principles of post-*Furman* capital punishment law.

The logic of petitioner's theory entails further practical repercussions which are incompatible with any viable system of criminal sentencing.

If a state's *capital* sentencing system is invalid for its failure to produce racially proportionate outcomes, then what of the other forms of criminal sentencing? For example, if those sentenced to death in Georgia were instead sentenced to life imprisonment without possibility of parole, would the racial proportionality argument lose all of its force—such as it is—merely because the death penalty was no longer implicated? Nothing in the core logic of petitioner's argument so indicates.

Indeed, petitioner's primary argument in this case is phrased as follows (Pet.'s Br. p. 32): "A. The Equal Protection Clause of the Fourteenth Amendment Forbids Racial Discrimination *in the Administration of Criminal Statutes.*" [emphasis added]. Although this point is unassailable by itself, petitioner insistently equates collectively "disproportionate" sentencing outcomes with the actionable racial discrimination he refers to. The argument therefore plainly extends the demand for racial equilibrium in sentencing to other serious criminal pen-

alties (e.g., life imprisonment), if not to *all* criminal penalties. Compare *Britton v. Rogers*, 631 F.2d 572 (8th Cir. 1980), where the court rejected the argument that racially disparate sentencing outcomes in past rape cases justified habeas corpus relief.

The implication is clear. Acceptance of petitioner's argument would open the door to Title VII-style "disparate impact" challenges to criminal sentences of all kinds. The entire criminal sentencing process would become bogged down in the same morass of "underutilization" concepts, multivariate regression analysis, and "goals" or quotas which now complicate employment discrimination law.

Nor do the radical implications end there.

If the Constitution requires collective sentencing outcomes to satisfy some acceptable norm of *racial* proportionality, what then of the other "suspect" classifications under this Court's Equal Protection jurisprudence? For example, discriminations based on alienage or on national origin now trigger the same degree of scrutiny as race discrimination. *City of Cleburne v. Cleburne Living Center*, 105 S. Ct. 3249, 3255 (1985). Moreover, it is now recognized that gender-based classifications "also call for a heightened standard of review," *City of Cleburne*, 105 S. Ct. at 3255, as do those based upon illegitimacy. *Id.*

Accordingly, petitioner's theory would also require proportional allocation of capital sentences with respect to such classifications as alienage, ethnicity, sex, and legitimacy. If black murderers are entitled to invalidate their death sentences on grounds of statistical disparate impact, it would follow that those falling within the other specially protected classifications are entitled to produce additional studies showing analogous forms of disparate impact as to *their* respective groups. Further, petitioner's argument would allow defendants of *all* classifications to challenge their sentences based on corresponding

variants of petitioner's theory of *victim*-oriented discrimination—e.g., a claim that those who murder American citizens are more likely to receive the death sentence than those who murder resident aliens. Such a claim would stand on the *exact* same constitutional footing as the claim at issue here. All of these predictable repercussions would hopelessly complicate the state's efforts to enforce capital punishment systems which have already been upheld as valid by this Court.

These are not exaggerated alarms, but merely acknowledgement of the logical consequences that could follow the Court's acceptance of petitioner's radical theory. Just as theories of statistical-based employment discrimination have produced permutations once deemed inconceivable, *e.g., AFSCME v. State of Washington*, 578 F.Supp. 846 (D.Wash. 1984), *rev'd*, 770 F.2d 1401 (9th Cir. 1985), so too would endorsement of petitioner's theory of disparate impact in sentencing lead to bizarre and unforeseen applications as well.

No workable system of criminal justice could accommodate the demands for race- and class-based parity in sentencing advanced by petitioner. Nor does the Constitution require a regime of "statistical justice" which would subject the validity of every criminal sentence to the vagaries and manipulations of fluctuating demographic data.

II. EVEN IF A DISPARATE IMPACT STANDARD WERE APPROPRIATE IN THE CRIMINAL SENTENCING CONTEXT, PETITIONER FAILS TO MAKE A PLAUSIBLE CASE ON THAT BASIS AS WELL

A. Petitioner's Basic Contention is Based on a Myth

The core premise of petitioner's argument is the persistently repeated charge that the death penalty as administered today pervasively discriminates against blacks. The problem with this key premise is that it is demonstrably false.

In a comprehensive study of sentences imposed on thousands of killers during the period 1980-1984, the Justice Department's Bureau of Justice Statistics has discovered that it is *white* defendants who are disproportionately sentenced to death and disproportionately executed in this country. Bureau of Justice Statistics Bulletin, *Capital Punishment 1984*, NCJ-98399, pp. 7-9, Tables 11, A-1, A-2 (August 1985) (hereafter cited as "BJS Bulletin").

The BJS report shows that for every 1,000 whites arrested on homicide charges, approximately 16 were sent to prison under sentence of death. *BJS Bulletin.* at p. 9, Table A-2. In comparison, fewer than 12 blacks for every 1,000 arrested on the same charges were sent to death row. The data indicates that white perpetrators as a group are 36% more likely to be sentenced to death than black perpetrators of comparable capital offenses.

Further, white homicide convicts on average run a significantly greater likelihood than their black peers (i.e., 55% more likely) of actually being executed subsequent to death sentence. From 1977 to 1984, 1.7% of all death row whites were actually executed, compared to only 1.1% of blacks on death row. *Id.*, p. 7, Table 11.

These nationwide figures are not to suggest that the death penalty as administered actually discriminates against white perpetrators. The complex combination of factors involved in each individual homicide is so unique and personalized that attempts to draw legitimate inferences from such generalized class-based sentencing variations are futile.

But the BJS statistics *do* discredit petitioner's sweeping contention that anti-black discrimination permeates the capital sentencing process. Moreover, other reputable studies undercut the claims of *victim*-anchored race discrimination in capital sentencing as well.[4] In sum, the

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[4] *See, e.g.*, Note, *Discrimination and Arbitrariness in Capital Punishment: An Analysis of Post-Furman Murder Cases in Dade*

image of a pervasively discriminatory criminal justice system which petitioner seeks to convey as a means of attacking the death penalty is flatly inaccurate.

Petitioner might protest that the BJS Bulletin reflects nationwide data and is therefor technically irrelevant to a murder conviction under Georgia state law. But by the same reduction logic, the *state*-wide data relied upon for petitioner's most strongly-asserted contentions would also be over inclusive.

A truly-focused study for purposes of legitimate, "apples-to-apples" comparison between petitioner's sentence and those in like cases—and one which eliminates cross-regional and urban/rural factors which might also account for sentencing disparities—would have to be confined to (1) murders of law enforcement officers (2) in Fulton County only. Such a comparison with cases truly similar to his own would seem an obvious prerequisite to an individual claim of discriminatory sentencing. However, the limited number of such cases (i.e., six—see 580 F. Supp. at 378) is too small to allow for any valid statistical analysis or comparison. *See, e.g., Adams v. Wainwright, supra,* 709 F.2d at 1449; *Andrews v. Shulsen, supra,* 600 F.Supp. at 426. Accordingly, if the Court were to limit the proof to truly comparable cases within the specific prosecution venue, the statistical approach is plainly unsuitable due to insufficient data.

B. The Theory of Victim-Based Discrimination is Legally and Logically Invalid

Petitioner's curious reliance on the oblique "race-of-the-victim" approach is best explained by the fact that focusing strictly on race of the defendant simply would

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County, Florida, 1973-76, 33 STANFORD L. REV. 75, 100-01 (1980), which demonstrates that the seeming predominance of death sentences in the case of white-victim murders by blacks is fully explained by the fact that such killings disproportionately account for the highly aggravated felony-murders which allow and motivate death sentences.

not work. As clearly demonstrated by the district court, 580 F.Supp. at 368, by the Court of Appeals, 753 F.2d. at 887, and by the *BJS Bulletin*, *supra*, the death penalty is not disproportionately applied to black defendants. On the contrary.

Although Eleventh and Fifth Circuit cases have broadly assumed that a death sentence may be challenged on the alternative grounds of *victim*-based disparate impact statistics, that theory is by no means established as the Law of the Land.

Some courts have displayed well-founded skepticism towards this oblique and "once-removed" method of attempting to prove discrimination. In *Spinkellink v. Wainwright*, 578 F.2d at 614 n.39, the Fifth Circuit approvingly quoted the district court's ruling that challenges to the application of the death penalty "must necessarily be limited to the persons who receive it rather than their victims". In *Britton v. Rogers*, *supra*, 631 F.2d at 577 n.3, the Eighth Circuit held that convicted criminals lack standing to challenge victim-based racial discrepancies in sentencing. And the district court in the instant case opined that such victim-based claims are not cognizable under either the Eighth Amendment of the equal protection clause of the 14th Amendment. 580 F.Supp. at 347.

These concerns are well-taken, and should command the careful attention of this Court. A murderer freely selects his own victim; it would therefore be grotesquely ironic for this Court to hold that the slain *victim's* race can be subsequently invoked by the murderer as a shield against his just punishment. Yet that is *exactly* what the petitioner is doing in this case. A more distorted variant of the doctrine of *jus tertii* would be difficult to imagine.

There are other convincing reasons why the Baldus study's race-of-the-victim statistics cannot serve as a

valid or reliable basis for overturning death sentences. For instance, the record shows that the Baldus study was unable to account for the race of the victim in 62 of the cases it examined. 580 F.Supp at 358. This raises the question of precisely how the Baldus study was able to verify that the juries in all the studied cases had actually considered clear and reliable evidence of the race of the victim. After all, the murder victim is not present at the trial and the victim's race is not normally a contested point requiring proof or authentication. Therefore, it is not at all clear that reliable evidence of the victim's race is uniformly and unambiguously conveyed to the jury in every case.

Yet the Baldus study and petitioner's arguments rest on the assumptions that Georgia juries *invariably* have an accurate and unambiguous understanding of the victim's race—and that they ascribe significance to that information. We submit that such an assumption is invalid, providing further grounds for rejecting petitioner's race-of-the-victim theory.

C. The Findings of the District Court on the Study's Invalidity Should be Affirmed

In a thorough and painstaking analysis that warrants this Court's careful attention, the trial court made convincing first-hand findings that the Baldus study was riddled with errors in its data base and was not essentially trustworthy; relied on statistical models which were not sufficiently predictive to support an inference of discrimination; and did not even compare like cases in purporting to find racially disparate impact. 580 F.Supp. at 354-365.

For reasons not clearly expressed, the Court of Appeals did not overtly pass judgment on these findings of fact. Instead, it chose to "assume" the Baldus study's validity and proceeded to hold that petitioner's argu-

ments failed as a matter of law even given that assumption. 753 F.2d at 894.

Contrary to petitioner's disingenuous suggestions, however, the Court of Appeals in no way disturbed or questioned the trial court's actual findings of the study's invalidity. Indeed, it expressly disclaimed any intent to do so. *Id.* at 894-95.

Under Fed. R. Civ. P. 52(a), the Court of Appeals could have set aside the district court's findings of fact only if they were "clearly erroneous." *United States* v. *General Dynamics*, 415 U.S. 486 (1974). Obviously, the Court of Appeals did not do that in this case. So the trial court's findings stand unimpeached.

Therefore, if this Court does not affirm the Eleventh Circuit's holding on the legal issues, petitioner's death sentence should still be affirmed on the ground that the Baldus study is too flawed and untrustworthy to raise a *genuine* issue of racially disparate sentencing. Given the manifest thoughtfulness and thoroughness of the district court's findings, there is no sound reason for this Court to avoid passing on whether they are clearly erroneous. And it would be a presumptuous appellate court indeed that would dismiss the trial court's deliberate and painstaking demonstration of the study's many palpable flaws as "clearly erroneous."

D. The Myriad Individualized Factors and Combinations of Factors Which Influence A Death Sentence Are Not Susceptible To Quantification Or Precise Comparative Analysis

Petitioner's theory of discrimination is only as good as the precision and reliability of its base data, the predictive capacity of its statistical models, and the essential equivalency of the cases it purports to compare. The district court's thorough scrutiny of the Baldus study produced unassailable findings that it is substantially deficient in each of those critical aspects. 580 F.Supp. at

354-365.[5] The study therefore fails to establish the factual predicate which is necessary even to *reach* petitioner's novel legal theory.

Putting aside the mere flaws, mistakes and inconsistencies of the study, amici would call the Court's attention to what we consider to be a fatal and inherent fallacy in petitioner's methodology. Petitioner's lawyers and "experts" claim that they carefully recorded and accounted for some 200 legitimate sentencing variables (e.g., various aggravating and mitigating factors) in attempting to isolate the "inexplicable" sentencing discrepancies which they then blithely assigned to the race factor. The problem with this approach is that (a) they did not even thoroughly account for the factors which they claim to have accounted or "controlled" for; and (2) the limited number of sentencing factors which they *did* choose to account for did not even begin to exhaust the vast range of legitimate sentencing variables (*and combinations thereof*) which can result in a legitimate, non-discriminatory sentencing variation.[6]

One particular example of these fundamental flaws is illustrative but by no means exhaustive.

In demonstrating the numerous flaws infecting the data base of the Baldus studies, the district court found that the students who coded the various sentencing factors affecting each case were limited by the study's structure to entering only *one* method of inflicting death. As the court found, 580 F.Supp. at 356:

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[5] Several professors or scholars who have a professional interest in the acceptability of statistical studies as binding proof in litigation have filed a brief *amicus curiae* supporting the complete validity of the Baldus studies. This Court should regard such palpably self-serving arguments with maximum skepticism.

[6] The district court expressly so found, 580 F.Supp. at 364: "[The Baldus studies] do not account for a majority either of aggravating or mitigating circumstances in the cases."

> The effect of this would be to reduce the aggravation of a case that had multiple methods of inflicting death. In coding this variable the students generally would list the method that actually caused the death *and would not list any other contributing assaultive behavior.* R463. [emphasis added].

The effect of such crude limitations on the accurate depiction of different capital cases can best be understood by observing how they would apply to the coding of an actual case.

In *Andrews* v. *Shulsen*, 600 F.Supp. 408 (D.Utah 1984), *appeal pending*, No. 84-2781 (10th Cir.), the defendant and his accomplice murdered three people and brutally injured two others while robbing a Hi Fi shop in Ogden, Utah. The *immediate* cause of death in the murders was simply shooting. But before the fatal shootings, the defendants had (a) attempted to force the father of one of the victims, at gunpoint, to pour poisonous liquid drain cleaner down the throats of his own son and two other bound teenage victims (he refused); (2) force-fed the poisonous drain cleaner to the hapless victims, then taped their mouths shut; (3) raped one of the teenage girl victims before methodically shooting her in the head; (4) attempted to strangle the father-victim with an electric cord; and (5) viciously kicked a long ball-point pen deep into the father's ear.

It is obvious from the district court's findings that the Baldus study's methodology would not begin to capture or account for all the hideous particulars and compounded variables which moved a Utah jury to vote for the death sentence in *Andrews* v. *Shulsen*. The cause of death would have been listed by the coders as a shooting (see 580 F.Supp. at 356). Clearly, the collective horrors of such a case cannot be reduced to neatly coded variables in a statistician's pigeon holes. This incapacity to capture the intangible but critical nuances of actual

murders undercuts the authenticity of *all* the study's comparisons of supposedly similar cases.

As it turns out, the murderers in *Andrews* v. *Shulsen* were black and their victims were white. The perpetrators in that case have appealed their death sentences, asserting the same claim of racially discriminatory sentencing presented in the instant case. If petitioner prevails here, the just death sentences of the likes of the "Hi-Fi" murderers will be absurdly attributed to racial factors in the eyes of the law, rather than to the malicious particulars which in fact account for them. Nothing in the Constitution or this Court's capital punishment jurisprudence requires such an unreasonable and unjust result.

CONCLUSION

For all the foregoing reasons, the decision of the Eleventh Circuit should be affirmed.

Respectfully submitted,

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